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Supreme Court of the United States

October Term, 1969

No. ~~75~~ 18

In the Matter of the Application of

MARTIN ROBERT STOLAR,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

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Supreme Court of the United States

October Term, 1969

No. 75

In the Matter of the Application of

MARTIN ROBERT STOLAR,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

Opinion Below

The order in the Court below was accompanied by an unreported memorandum (55a-56a).[1] The memorandum approves the recommendation of the Committee on Admissions of the Columbus Bar Association (hereinafter "Committee") which is likewise unreported (26a-30a).

Jurisdiction

The final order of the Supreme Court of Ohio was made and filed on February 27, 1969 (55a-56a). The Petition for Certiorari was filed on March 31, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

[1] The designation "a" refers to pages of the Single Appendix.

Constitutional and Regulatory Provisions Involved

The principal constitutional provisions involved are Articles Three and Six of the United States Constitution and the First, Fourth, Fifth, Sixth and Fourteenth Amendments thereto, and Rule XVII of the Rules of the Supreme Court of Ohio, entitled, "Admission to the Practice of Law" (reprinted *infra*, pp. 51-57).

Questions Presented

Does the compelled disclosure by applicants for admission to the Ohio Bar of their political and personal activities, beliefs and associations

(1) violate through overbreadth and otherwise their freedom of speech and association and their right to privacy under the First and Fourteenth Amendments to the Constitution;

(2) interfere with the right to counsel and freedom of speech and association of a class of litigants who seek redress of their federal rights and the right of attorneys to practice law in the federal courts in violation of Articles Three and Six of the Constitution and the First, Sixth and Fourteenth Amendments;

(3) deny their rights to due process and to freedom from unreasonable search and seizure under the First, Fourth and Fourteenth Amendments where the state's inquiry is made of all applicants and is not based upon probable cause arising from facts peculiar to the individual applicant;

(4) violate their rights to due process and freedom of speech, association and belief by placing upon them the burden of proving lawful membership in an organization which is claimed to be advocating the overthrow of government;

(5) violate the void for vagueness principle of the First and Fourteenth Amendments insofar as it demands the details of membership in organizations which advocate the overthrow of government;

(6) violate the constitutional privilege against self-incrimination where answers are compelled under oath, overriding the applicant's assertion of such privilege?

Statement of the Case

Petitioner is 26 years old, a graduate of New York University Law School in June, 1968, and a member of the New York Bar (19a). At the time the Petition was filed, petitioner was assigned to the Columbus [Ohio] Metropolitan Area Community Action Organization through the VISTA program of the United States Government Office of Economic Opportunity (8a).

On January 3, 1969 petitioner applied for admission to the March, 1969 Ohio Bar Examination by duly filing the necessary application forms and other required certificates, affidavits and fees with the Supreme Court of Ohio (3a).

As part of that application petitioner submitted two personal background questionnaires,[2] made under oath (13a, 16a),[3] constituting the initial stage of an investigation into his "character, reputation and moral qualifications" for admission to the Ohio Bar. The questionnaire for registration contained the following statement as to his "reasons for desiring to be an attorney at law":

> "My main reason for desiring to be an attorney is that the law is an ever-changing field—it con-

[2] These questionnaires are titled: "Questionnaire for Registration" (5a-13a) and "Questionnaire for Admission" (14a-16a).

[3] False statements on the questionnaires are subject to the perjury provisions of Ohio Rev. Code § 2917.25.

> tinually develops and does not remain static or stagnant. Consequently it differs from a great many other fields into which I could have gone as a career. Secondanly, [sic] the law can be an effective tool for molding the social change so necessary today. Working with and within the law to produce such change is, for me, the most important contribution I can make to the society in which I live" (11a).

Petitioner was required to and did consent to have an investigation made as to his "moral character, professional reputation and fitness for the practice of law" (12a), to authorize every person or governmental agency to furnish pertinent information to the court below, and specifically to authorize his Local Draft Board to release Selective Service information to the court (12a, 13a).

The investigation conducted by Ohio resulted in its acquisition of petitioner's application for admission to the Bar of the State of New York which contained a number of questions subsequently either recognized by the New York courts or held by a statutory district court to be unconstitutional. See *Law Students Civil Rights Research Council Inc.* v. *Wadmond*, consolidated with *Wexler* v. *The Supreme Court of the State of New York*, 299 F. Supp. 117 (S.D.N.Y. 1969) *appeal pending*, No. 696, October Term, 1969 (hereinafter "*LSCRRC* v. *Wadmond*").

Petitioner's response to that New York questionnaire disclosed his election as Administrative Director of the New York University Law School Moot Court Board, an award of a resident fellowship by New York University, and his service as a graduate adviser in an undergraduate dormitory (23a). He also referred to his activities as a Boy Scout and his participation in his Temple's religious educational programs (23a). He responded affirmatively to the questions: "Do you believe in the principles underlying the form of Government of the United States?"

(23a), "Can you consciously and do you affirm without any mental reservation that you have been and are loyal to the Government of the United States?" (24a) and whether he would "consciously endeavor to conform [his] professional conduct to the Canons of Ethics." (*Ibid*).

Petitioner gave a negative response to a further question: "State whether you have been or are a member of any party or organization engaged in propagating or pledged to effect changes in the form of government provided for by the United States Constitution, or in advancing the interests of a foreign country? If so, state the facts fully." (23a).

Finally, petitioner stated to the New York admission court his reasons for desiring to practice law:

> "Early in my college years, when I first began to think of a life's work, I sought out the law chiefly because it was not a static field. As I matured I saw that the law not only changed as it developed but it was capable of producing social change.
>
> "In addition, the practice of law would give me a chance to become knowledgable [sic] in many other fields—a kind of Renaissance-man profession, I had, and still have, no desire to channel all my life's work into one specialty and prefer the flexibility which the legal profession offers." (24a).

Petitioner's dispute with Ohio arose when he declined to answer three of the questions in the Ohio questionnaires:

> "12(g): State whether you have been, or presently are . . . a member of any organization which advocates the overthrow of the government of the United States by force. . . . If your answer to any section of the above question is 'Yes' set forth the facts in detail. . . ." (Questionnaire for Registration, 10a).
>
> "13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member." (Questionnaire for Registration, *ibid*).

> "7. List the names and addresses of all clubs, societies or organizations of which you are or have been a member since registering as a law student." (Questionnaire for Admission, 15a).

Petitioner responded to each of these questions:

> I will not answer this question under my right as guaranteed by the Fifth Amendment of the United States Constitution.

Subsequently, petitioner appeared for a personal interview before two members of the Committee who inquired as to why he had refused to answer the questions (27a, 29a). He stated that his refusal was based upon his Fifth Amendment privilege and upon the ground that the "questions were not pertinent to his moral and character fitness as an applicant" (27a). Petitioner was informed as to the possible consequences of his refusal. (27a, 29a). The interviewers, however, continued their oral interrogation of the petitioner, which finally resulted in his statement:

> "that he is not now and has never been a member of the Communist Party, or any socialist party, or of the Students for a Democratic Society and . . . that he has signed the standard U.S. Army pre-induction security oath, which has reference to the 'Attorney General's List' " (29a).

Both members of the Committee reported that they were very favorably impressed by the petitioner. Mr. J. Richard Lumpe found the petitioner "to be a very learned person and a very pleasant person" (27a). His colleague, Mr. Richard Snodgrass, concluded that "this applicant possess[es] the high standards of character required for admission to the practice of law" (28a) and that he "found Mr. Stolar to be honest and forthright." He added:

> "His statements evidenced also a certain commitment to principle for its own sake, an unusually great amount of social awareness, and a degree of self-

> interest not reprehensible. On the basis of the interview and the background actually revealed in Mr. Stolar's applications I have no reluctance to recommend Mr. Stolar for admission to the practice of law."

However, he said:

> "My recommendation is qualified, however, in that I can recommend him only if the Committee as a whole is willing to recommend his admission despite his refusal, with full notice of the possible consequences, to answer questions on the applications touching on his present and former organizational membership. (29a)."

Mr. Lumpe's conclusion was less equivocal:

> "Based on my investigation, I find Mr. Stolar to be a very learned person and very pleasant person, but I cannot recommend him for admission due to the fact he places himself above the rules of the Court and feels that he cannot abide by them when they run afoul of his personal convictions. I also cannot recommend him for admission since I was unable to fully complete the necessary investigation into his moral and character fitness due to his refusal to allow a complete investigation to be made." (27a.)

After a full Committee meeting which considered these recommendations, the Chairman notified petitioner that the Committee had "voted to deny your application unless by February 21, 1969" he answered the three questions involved. (30a).

Petitioner replied in a letter dated February 10, 1969 that, "[i]t is my belief that such questions are not within the proper scope of review for a Bar Association Committee on Admissions and in any event, the answers to such questions are protected by the First and Fifth Amendments of the United States Constitution." (31a).

The Chairman of the Admissions Committee reported to the Court below that "[i]n view of Mr. Stolar's refusal

to answer the questions above referred to, the Admissions Committee of the Columbus Bar Association recommends that Mr. Stolar's application for admission to the Ohio Bar Examination be denied". (33a-34a).

Counsel for petitioner first entered the case while the court below was considering the Committee's recommendation by informing the court below of the then recent decision in *LSCRRC* v. *Wadmond*, *supra*, which appeared to be in conflict with the Committee's recommendation. In that case, the statutory court, per Circuit Judge Friendly, held that questions to applicants for the New York Bar, *similar to the questions petitioner refused to answer*, were impermissible under the First Amendment. Petitioner's counsel also supported petitioner's First and Fifth Amendment grounds by citing this Court's decision in *Spevack* v. *Klein*, 385 U.S. 511, District Judge Motley's concurring-dissenting opinion in *LSCRRC* v. *Wadmond, supra* and a statutory district court decision in *Haskett* v. *Washington,* 294 F. Supp. 912 (D.D.C. 1968) (40a-52a).

On February 27, 1969, the court below decided without opinion that "the recommendation of the Committee on Admissions should be approved" (55a).

Summary of Argument

A. This case presents a broad challenge to the constitutionality of political screening and interrogation in the areas of public employment, licensing and benefits. The Court in recent years has curtailed many of the dangerous aspects of such political regulation—aspects which are present in each of the three questions put by Ohio to the petitioner which gave rise to the present controversy.

This case, however, going beyond these specific questions, raises the question of whether any of these loyalty-

security programs are consistent with the First and Fourteenth Amendments. It is appropriate that this broad issue be raised in a case involving admission to the bar because of the larger interests at stake than the liberties and privacy of the individual applicant. Political tests for lawyers necessarily have a chilling effect upon their political activities prior to application for membership in the bar. It also limits the availability of legal assistance by lawyers sympathetic to minority and dissident groups.

B. Professional competence aside, the only criterion for admission to the bar consistent with the First and Fourteenth Amendments is "good moral character." That criterion is inapplicable to political activities—even if they were to involve the commission of crime—for such political activities are not evidence of moral turpitude.

There is no evidence that lawyers of a particular political coloration—even members of an organization advocating the overthrow of the Government by force— have been derelict in their professional obligations or are likely to be so. No disciplinary proceedings have produced evidence of a relationship between political activities and moral turpitude.

The burden is on Ohio to establish the contrary. Accordingly, even if it were to rewrite its Bar admission standards to meet tests previously imposed by this Court it would violate the basic principle that no political associations, activities or statements may consistently with the Fourteenth Amendment obstruct admission to the Bar.

C. Should the Court take a more limited approach to the problem, Ohio's sweeping inquiry must be held improper under this Court's rule of precision in First Amendment cases. This rule of precision is necessary to safeguard the "breathing space" essential to the survival of First Amendment rights of free speech and association. Ohio has failed to adhere to this rule of precision in several major respects:

1. Assuming, *arguendo,* Ohio's proper interest in preventing "politically unfit" citizens from practicing law, the destructive effect on personal and public interests, summarized above, requires that it choose a less restrictive alternative than its present program. For that program is bound to deter attorneys and prospective attorneys from engaging in political activities which may delay, if not prevent, their admission to the Bar—a classic case of prior restraint.

The interest which Ohio asserts is that of safeguarding clients and the courts from unethical behavior by lawyers who "espouse illegal aims." Quite aside from the remoteness of this speculative "danger," Ohio has the "less restrictive alternative" available, namely, criminal or disciplinary sanctions in the event that its fears should be realized in a particular case.

2. Respondents have not indicated any statute or regulation of Ohio which establishes a political test for admission to the Bar. Nor was petitioner informed, prior to the determination of the court below denying admission, of the existence or nature of such a political test. Thus, although petitioner was repeatedly advised by members of the Committee that his refusal to answer obstructed their investigation, he was never advised of any purpose to be served by the associational interrogatories, particularly question 12(g) (*supra,* pp. 5-6).

Ohio's political test for admission was first revealed in respondents' Brief in Opposition to the Petition at p. 13. There, respondents stated that Ohio's objective was to determine whether an applicant "espouses" an organization's "illegal aims" at the times of his membership or of his application to the Bar. Substantial questions immediately arise regarding the vagueness which inheres in the terms "espouse" and "illegal aims" and the concept of "membership."

Ohio's program also fails to observe the distinction between mere advocacy and "advocacy directed to inciting

or producing imminent lawless action and . . . likely to incite or produce such action," *Brandenberg* v. *Ohio,* 395 U.S. 444, 447; thus, it both deters and proscribes speech which is constitutionally protected. Equally defective with respect to the right of association, it does not require that there be "specific intent" to further an organization's aim of violent overthrow by resort to unlawful conduct or advocacy. *Keyishian* v. *Board of Regents,* 395 U.S. 589, 608.

3. The investigational apparatus employed by Ohio violates the rule of precision by permitting a broad political inquiry without probable cause and without other sensitive procedural tools.

The First and Fourth Amendments require a factual basis for a search, particularly one of this breadth. That issue was not determined by this Court in the earlier Bar cases which involved both narrower questions and some foundation. In analogous situations in the First Amendment area, this Court has required a factual foundation. That rule is even more appropriate here where the respondents possess an adjudictory as well as an investigatory power. Proof of probable cause has been required in situations involving far more compelling and immediate state interests. Since admission to the Bar does not involve comparable damage to the state, a similar foundation is a constitutional pre-requisite.

4. The particular questions put to petitioner as to every organizational connection are improper under the decisions of this Court, since they constitute a type of "unlimited or indiscriminate search" condemned in *Shelton* v. *Tucker,* 364 U.S. 479.

The questions concerning membership in organizations advocating the overthrow of the government by force and violence have the defects noted above, *i.e.,* the absence of knowledge and the absence of congruence of knowledge

and membership. Further, they treat as irrelevant such constitutional requirements as specific intent, incitement and likelihood of danger. The disclosure of mere knowing membership creates a presumption of illegal membership, imposing upon the applicant the burden of rebuttal by a thorough review of his entire political background. Such a presumption is irrational, contrary to the rule that guilt is personal and compels one to "steer far wider of the unlawful zone than if the state must bear these burdens." *Speiser* v. *Randall*, 357 U.S. 516, 526.

Indeed the presumption of unlawful membership arising from an affirmative answer to question 12g may be irrebutable like the similar presumption considered in *Keyishian* v. *Board of Regents, supra,* at 608. For under Ohio's program one cannot rebut the presumption even by proving lack of such elements as knowledge of the organization's purposes, specific intent or actual incitement.

Finally, the presumption denies due process because respondents' determination that an organization advocates violent overthrow is not the product of a review of the organization's history or purposes under the procedural safeguards demanded by *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123.

D. The infringement of the First Amendment rights of applicants to the Bar by Ohio's program is the inevitable consequence of its having undertaken to enforce a political test. Such a task is a subjective one; it is normally limited to contemporary community standards and it bears no relationship to the traditional concern of the Bar for applicants of good moral character.

E. The respondents' suggestion that petitioner *obstructed* their investigation does not have the necessary constitutional support of a judicial finding of fact. Such a finding could not have been made in view of petitioner's

response to specific questions, the absence of any evidence against him, and respondents' possession of his New York questionnaire. Respondents' speculation as to the importance of its sweeping investigation only establishes their unreasonable intrusion into a protected area.

II. Petitioner had an independent ground for his refusal to answer these sweeping political questions: his privilege against self-incrimination.

The privilege, of course, must be liberally construed in the light of its history and purposes. While it has been applied to public employees, this Court has expressed special concern for members of the Bar who do not have the duty of accountability to an employer. Similar considerations require that applicants for admission enjoy the same protection that is particularly appropriate in response to the kind of sweeping political inquiry which gave rise to the privilege.

POINT I

ADMISSION TO THE OHIO BAR MAY NOT, UNDER THE FIRST AND FOURTEENTH AMENDMENTS, BE CONDITIONED UPON PETITIONER'S SURRENDER OF HIS ASSOCIATIONAL PRIVACY.

A. Introduction

Ohio has refused to admit petitioner to its Bar unless he surrenders the privacy of his political beliefs, associations and speech, by answering the broad associational interrogatories set forth in the admission questionnaires. These interrogatories are an integral part of the political screening program which Ohio, like every other state and

some federal jurisdictions, has instituted to regulate the political fitness of applicants to the Bar.[4]

Petitioner's challenge, based on the First and Fourteenth Amendments, calls into question the constitutional propriety of political screening programs in the sensitive area of bar admissions and of the investigational apparatus by which these programs are implemented. In recent years this Court has curtailed many of the dangerous aspects of political regulation in areas other than Bar admission which are still present in the Ohio program under review.[5] The instant case, of course, establishes that Ohio's program is irreconcilable with the recent decisions of the Court. It also poses the question of whether any political screening and interrogation in the area of public employment, licensing and benefits is consistent with the requirements of the First Amendment.

Taking note of the tradition in this Court, beginning with *Ex parte Garland*, 71 U.S. (4 Wall.) 333, it is appropriate that a major test of the power of the state to insti-

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[4] The political screening program involved in this case closely resembles the program under review in *Baird* v. *State Bar of Arizona, cert. granted* 394 U.S. 957 and presented by *LSCRRC* v. *Wadmond, supra.*

See generally, Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480 (1953); Countryman & Finman, *The Lawyer and Modern Society*, 758, 822-884 (1966); Ginger & Koenigsberg, *Report on Rules for Admission to the Bar; Tests of Applicants' "Loyalty" and "Good Moral Character"*, 18 Law. Guild Rev. 38 (1958); 1 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States*, 262-283 (L.ed. 1967); Note, *Inquiries Into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 Columbia Survey of Human Rights 33 (1967-1968).

[5] See e.g. *Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Aptheker* v. *Secretary of State*, 378 U.S. 500.

tute political screening programs should arise in the context of a Bar admission case. For this Court has long recognized that, because more is at stake than the liberties and privacy of individuals, the Bar is a particularly unsuitable area in which to experiment with First Amendment freedoms.[6]

Political controls on the Bar, as exemplified by Ohio's screening program, directly threaten an interest of overriding importance to our society—the independence of the Bar.[7] The threat of sanctions for political unorthodoxy, combined with the unlimited and indiscriminate power of inquiry into an individual's political privacy has the undeniable effect of inhibiting members (including petitioner) and prospective members of the Bar from association with or representation of unpopular groups or causes.[8]

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[6] See *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (Mr. Justice Frankfurter concurring); *Konigsberg* v. *State Bar*, 353 U.S. 252, 273; *NAACP* v. *Button*, 371 U.S. 415.

[7] See *NAACP* v. *Button*, *supra*; *In re Sawyer*, 360 U.S. 622; *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968); *Lefton* v. *City of Hattiesburg*, 333 F.2d 280, 285, 286-287 (5th Cir. 1964); *Sobell* v. *Perez*, 289 F. Supp. 392, 399 (E.D. La. 1968).

[8] See *NAACP* v. *Button*, *supra* at 430-438, 443-445; *Hackin* v. *Arizonia*, 389 U.S. 143, 146 *appeal dismissed* (Mr. Justice Douglas dissenting); *Konigsberg* v. *State Bar*, 366 U.S. 36, 73-74 and *In re Anastaplo*, 36 U.S. 82, 115-116 (Mr. Justice Black with whom Chief Justice Warren and Mr. Justice Douglas concur, dissenting); cf. *Shelton* v. *Tucker*, 364 U.S. 479, 486-487; see also Chafee, *Free Speech in the United States* 4 (1941); Brief of the Attorney General of the United States as Plaintiff-Intervenor in *Sobell* v. *Perez*, *supra*; Conference Working Group, *The Independence of the Bar*, 13 Law, Guild. Rev. 158 (1953).

The role played by law students in civil rights and civil liberties litigation, as research assistants or as counsel under special programs allowing third-year law students to represent indigents in civil and criminal actions, should be emphasized in calculating the impact of the Ohio program on the availability of legal assistance in these areas. Because of a shortage of lawyers, adequate assistance

The spectre of the nearly successful attempt to purge communists, socialists, and in general, the politically unpopular from the Bar during the McCarthy period is too corporeal to allow this Court to ignore the dangers which inhere in the present example of political regulation. The warning announced in the celebrated report on *Loyalty Oaths for Lawyers* issued by the Committee on Law Reform of the Association of the Bar of the City of New York is of equal moment today as it was on the day it was delivered:

> "The establishment of the oath requirement might lessen the freedom of the Bar to accept the responsibility of representing unpopular causes. At this time, when Communists are being more frequently called upon to appear in courts, it is essential that they should not be deprived of their conceded right to be represented by counsel of their own choice. A lawyer might hesitate to represent accused Communists lest it be said that such representation constituted support of an organization of the prohibited kind." *The Proposed Anti-Communist Oath: Opposition Expressed*, 37 A.B.A.J. 123, 125 (1951).[9]

There are even broader consequences. Not only does limitation on the availability of legal assistance by sympathetic, if not like-minded attorneys or prospective attorneys, critically affect the ability of minority and dissident groups to obtain vindication of federal rights in the courts, but in a special sense these groups are also denied their

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[8] (cont.) of counsel for poor persons, prisoners or the racially or politically oppressed, has come to depend directly on the services of law students. See generally *Johnson* v. *Avery*, 393 U.S. 483, 489 and n. 9, and 491 (Mr. Justice Douglas concurring); *Hackin* v. *Arizona*, *supra*; Roberts, *Social Crisis and the Lawyer and Law Student: An Essential Meeting*, Villanova L. Rev. (Spring 1969); Lewis, "A Talk With Warren On Crime, the Court, the Country," *N.Y. Times Magazine*, pp. 34, 131-133 (Oct. 19, 1969).

[9] See generally Koenigsberg and Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 Law. Guild Rev. 111 (1951); Chafee, *Blessings of Liberty*, 157-176 (1956).

rights to freedom of speech and association. As this Court has recognized, litigation provides the poor, segregated and politically unpopular with an available and inexpensive mode of expressing their social and political beliefs. See *NAACP* v. *Button, supra* at 428-429, 431, 444-445; *Mine Workers* v. *Illinois State Bar Ass'n.*, 389 U.S. 217; *United States* v. *Robel, supra* at 283 n. 1 (Mr. Justice White dissenting); *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1; Syposium, *The Right to Counsel and the "Unpopular Cause"*, 20 U. of Pitt. L. Rev. 727 (1959). This method of expression has been increasingly important and, in some circumstances, indispensable to many political movements which sometimes view the judiciary as the only responsive institution and meaningful forum where questions of social and political justice are concerned. Views along these lines are suggested in petitioner's answer given on the questionnaire as to his reasons for desiring to become an attorney.

Finally, the fact that petitioner is already admitted to practice in New York magnifies the serious public and private consequences of political controls on the Bar, such as those instituted by Ohio. The power to screen the political fitness of out-of-state attorneys, exercised by Ohio in this case, increases the limitations on the ability of minority or dissident groups to obtain counsel, since frequently community prejudice forces these groups to depend exclusively on the out-of-state attorney for legal assistance. See *supra*, p. 15, ftn. 7.

B. Under the First Amendment, No Political Test May be Imposed for Admission to the Bar

While, in the light of the constitutional infirmities next to be discussed, this case does not *compel* a decision upon the point, the increasingly critical importance of the First Amendment, the independence of the Bar, and the representation of minority groups (*supra*, pp. 15-17) justify a broad ruling by this Court that no political test whatso-

ever—even knowing membership in an organization with the specific intent to advance its illegal purposes—may constitutionally be imposed upon applicants for admission to the Bar.

We recognize that this broad statement runs counter to the implications, at least, in the majority opinions of this Court in *Konigsberg* v. *State Bar, supra,* and *In re Anastaplo, supra.* Factually, those cases may be distinguished on the ground that they involved questions concerning the Communist Party which has been treated as *sui generis* by this Court in the light of Congressional and judicial findings.[10] Nevertheless, we urge a reconsideration of the underlying assumptions because they are irrelevant to the concept of "good moral character," inevitably introduce ambiguous political considerations running counter to the nature and needs of our democratic society, and represent a reversion from the sounder assumptions underlying this Court's decisions of a century ago in the justifiably famous cases of *Ex parte Garland, supra,* and *Cummings* v. *Missouri,* 71 U.S. (4 Wall.) 277.

Our analysis of the problem begins with the statement of a principle that will not be in dispute in this Court, namely, that any qualification for membership in the Bar, whether imposed by court or legislature, must under the due process clauses of the Fifth and Fourteenth Amendments have a "rational connection with the applicant's fitness or capacity to practice law." *Schware* v. *Board of Bar Examiners, supra.* As Mr. Justice Frankfurter added in his concurring opinion:

> "From a profession charged with such responsibilities there must be examined those qualities of truth-speaking, of a high sense of honor, of granite

[10] *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539; *Barenblatt* v. *United States,* 360 U.S. 109, 127-128; *Sweezy* v. *New Hampshire,* 354 U.S. 234, 266 (concurring opinion of Mr. Justice Frankfurter).

> discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character'." *Id.* at 247.

Except for occasions of political stress, this standard of good moral character has been historically limited to questions of personal morality, reliability and honesty necessary to assure adequate representation of clients in litigation and otherwise. Thus, in the first *Konigsberg* case, Mr. Justice Black referred to "good moral character" as representing in California "an absence of proven conduct or acts which have been historically considered as manifestations of moral turpitude." *Konigsberg* v. *State Bar, supra* at 263. Very recently the California Supreme Court reaffirmed this view in admitting to the Bar an applicant with a long series of arrests. *Hallinan* v. *Committee of Bar Examiners*, 421 P.2d 76 (Cal. 1966); see also CARDOZO, *J.* in *Matter of Rouss*, 221 N.Y. 81, 91. The decisions in Ohio have been consistent with this principle; one treatise summarizes them by stating that "honesty and fidelity are essential virtues of his calling."[11]

Disciplinary proceedings have been instituted against lawyers for fee splitting and other conduct in their capacity as attorneys deemed reprehensible.[12]

But political actions—not to mention the lesser acts of political association which apparently concern Ohio—have no connection whatsoever with one's "fair private character"—the significant phrase of *Ex parte Garland, supra* at 378, and hence, with the constitutional right to practice law. This Court recognized that fact in the companion case

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[11] 6 Ohio Juris. 2d, Attorneys at Law, § 11 citing *State ex rel. Kilborn* v. *Hand*, 9 Ohio 4. This treatise cites numerous Ohio decisions at §§ 6-64 to the same general effect. See also Page's Ohio Digest (1958), vol. 1, pt. 2 §§ 8-11.

[12] 6 Ohio Juris. 2d, Attorneys at Law, §§ 18, 28, 29, Ohio Ops. 171, *In re Burch*, 54 N.E. 2d 80 (conviction for failure to register as a foreign agent).

of *Cummings* v. *Missouri*, *supra* at 320, when it said of similar political disqualifications of clergymen:

> "It is manifest upon the single statement of many of the acts and of the professions and pursuits that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the profession and pursuits."

It is true that in difficult periods in this country attempts, sometimes successful, were made to deprive lawyers of their right to practice because of their political activities,[13] including those which were deemed to be and sometimes were serious violations of law. Examples include the actions taken or proposed against lawyers in New York State following the Revolution,[14] the test oaths introduced after the Civil War to prevent the practice of law by lawyers who took up arms against the government,[15] and the so-called Cold War period of our own century.[16] But the fact that lawyers, like other groups, subjected one another to oppression because of political activities does not in any way make such political activities, criminal or not, an index of bad moral character.

Political crime—because that is what we are dealing with—is not fungible with or any way related to private character. This has been recognized in other aspects of the law, the most familiar of which is the historic refusal of governments, including our own, to extradite persons charged with political crimes, however serious their char-

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[13] Rosenberg, *Constitutional Limitations on the Process of Admissions to the Bar*, 23 N.Y.U. Intra L. Rev. 135 (1968); Koenigsberg and Stavis, *supra*.

[14] See 2 Chroust, *The Rise of the Legal Professions*, 5-12 (1965).

[15] Koenigsberg and Stavis, *supra* at 119-120.

[16] Countryman, *Loyalty Tests for Lawyers*, 13 Law. Guild L. Rev. 149 (1953); Brown & Fassett, *supra;* Conference Working Group, *The Independence of the Bar*, *supra* at 159-172.

acter.[17] But there is no need to seek analogies in other fields since this Court's decision in *Ex parte Garland, supra,* where a future Attorney General of the United States [18] successfully overturned a statutory disqualification for practice in the federal courts based upon his participation in the rebellion against the United States. Nothing could have been more serious than the charges involved which included treason, as the dissenting opinion in this Court pointed out. Nevertheless, while the decision technically falls under the rubrics of bill of attainder and *ex post facto* law, it is a clear recognition that the serious political crimes on the part of Mr. Garland and other leaders of the Confederacy bore no rational connection with the issue of good moral character.

The considerations which move men under certain circumstances even to take up arms against their government, as *Garland* and *Cummings* indicate, are not evidence of moral turpitude, as our own history so well illustrates, and as we are reminded by the recent conviction of a leader of the South African Bar.[19] Professor Vern Countryman, in his masterly analysis of the problem many years ago, concluded that "[t]he power to license professions is not a power to license methods of governmental change." Countryman, *supra* at 156.

One is struck, given the mythology of our times, with the total absence of a basis for concluding that even a

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[17] Oppenheim, *International Law* (8th ed. 1955), Vol. I, 704-707, *A British Digest of International Law* (1965), 654, *et seq.*

[18] Garland, *Experience in the United States Supreme Court* (1898).

[19] Abram Fischer, a leader of that bar, was convicted on May 9, 1966 by the Pretoria Supreme Court on 15 counts of furthering the aims and objectives of the Communist Party and conspiracy to commit sabotage, and, five days later, sentenced to life imprisonment, *N.Y. Times*, col. 1, p. 5 (Jan. 29, 1966); col. 3, p. 2 (May 5, 1966), col. 2, p. 13 (May 10, 1966).

knowing and active member of an "advocating" organization will be derelict in his obligations as a lawyer. There is no evidence that lawyers in the Communist Party or in other so-called subversive organizations have been activated by anything but the highest level of professional ethics in the representation of their clients and behavior in the courts, including this Court. The reports of disciplinary committees and of reviewing courts are replete with instances of misconduct by members of the Bar, often culminating in disbarment. We have yet to see any evidence that political dissidency leads to or is causally connected with acts requiring disbarment.[20] Even the *ex parte* testimony before congressional committees with respect to membership by lawyers in the Communist Party and the reports of such plainly partisan committees have produced no evidence of dereliction by the lawyers of their responsibilities to the courts and their clients.

Constitutionally speaking, there is no distinction to be made here between members of and applicants to the Bar. Note, *Admission to the Bar Following Conviction for Refusal of Induction*, 78 Yale L. J. 1352 (1969); *Hallinan* v. *Committee of Bar Examiners, supra* at 81; the same good private character is required of both. The reasons successfully presented by the leaders of the Bar in the period of hysteria more than a decade ago in opposition to the proposed purge of Communist lawyers by test oaths and other means are equally persuasive as applied to the young men seeking to enter the profession today.

We submit, therefore, that even if Ohio were to rewrite its standards and to limit its interrogation to actual conduct in an attempt to meet tests of due process and of criminality, it would continue to violate the basic prin-

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[20] Along these lines, the exceptional case of disbarment after a conviction for violation of the Smith Act does not disprove this statement. See *Braverman* v. *Bar Ass'n*, 121 A. 2d 473, 481 (Md. 1956).

ciple which we urge to this Court, namely, that no political associations, activities or statements may, consistently with the Fourteenth Amendment, obstruct admission to the Bar.

C. Ohio's Investigatory Procedure Violates This Court's Rule Requiring Precision of Regulation in the First Amendment Area

Limiting our analysis to the instant case, there is no doubt that Ohio's screening program violates this Court's rule of precision which has been enunciated repeatedly in the last decade, particularly, to strike down as unconstitutional state legislation less vague and sweeping than Ohio's.

In *NAACP* v. *Button,* 381 U.S. 415, 438, the Court stated the governing principle, frequently reaffirmed thereafter,[21] that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

The "precision" rule is designed to safeguard the "breathing space" essential to the survival of First Amendment rights of free speech and free association (*id.* at 433; *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539, 544; *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604).

The rule has a particularly important application in cases involving political investigation because it erects a barrier against governmental interference with an individual's right of associational privacy. As the Court declared in *NAACP* v. *Alabama,* 357 U.S. 449, 462, and again in *Gibson* v. *Florida Legislative Comm., supra* at 544: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . . restraint on freedom of association . . . This Court has recognized the vital

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[21] See *Aptheker* v. *Secretary of State, supra* at 512, 513; *United States* v. *Robel, supra* at 265; *Keyishian* v. *Board of Rgents, supra* at 603-604.

relationship between freedom to associate and privacy in one's associations . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Where, as here, state regulation affects important public, as well as private, interests "precision" is doubly crucial. *Cf. Sweezy* v. *New Hampshire, supra* at 265-267 (Mr. Justice Frankfurter concurring).

In regulating admission to its Bar, Ohio has failed to adhere to the rule of "precision" in three major respects:

(1) Assuming its legitimacy, Ohio's purpose can be achieved by a method having a far less "drastic" impact on First Amendment freedoms than does the present political screening program;

(2) Ohio's political test for admission, including its most recent assimilation of "advocacy" to "espousal", is vague and overboard; and

(3) Ohio's investigational apparatus, including the three questions petitioner has refused to answer, permits a sweeping and indiscriminate search of the applicant's political privacy without probable cause and without any of the "sensitive tools" which minimize the deterrent effect of political inquiry.

1. The First Amendment Requires That Ohio Abandon Its Political Screening Program and Adopt a Less Restrictive Alternative Method of Regulation.

Even assuming that Ohio has a legitimate and substantial interest in preventing "politically unfit" citizens from practicing law, the destructive effect on personal and public interests noted above, compels the state to choose a less restrictive alternative than the course presently followed.

It is a principle of long standing that "[m]ere legislative preferences" are not sufficient justification for effectuating a state purpose" by means that "[diminish] the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State,* 308 U.S. 147, 161; *Thornhill* v. *Alabama,* 310 U.S. 88, 96. "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488. See also *United States* v. *O'Brien,* 391 U.S. 367, 377; Note, *Less Drastic Means and the First Amendment,* 78 Yale L. J. 464 (1969).

Therefore, Ohio, like "Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. The Constitution and the basic position of First Amendment rights in our democratic society demand nothing less." *Robel* v. *United States,* 389 U.S. 258, 268.

The dangers of a political screening program are well known. See *Schneider* v. *Smith,* 390 U.S. 17; *Keyishian* v. *Board of Regents, supra.* Such programs are comprised of two elements—inquisitorial investigation and prior restraint—which separately or in combination have been found, time and again, by this Court to pose a severe threat to the free exercise of First Amendment rights.

The wholesale invasions of political privacy instigated pursuant to the federal loyalty-security program, which Mr. Justice Douglas characterized as "the most blatant violations of the First Amendment we have ever known" [*Brandenburg* v. *Ohio,* 395 U.S. 444, 456 (concurring opinion)] serve to underscore by recent and tragic example the vulnerability of personal liberties when exposed to investigation and possible sanctions.

When viewed from the public interest in having available attorneys willing to offer sympathetic counsel to the politically outcast, the element of prior restraint stands out as the dominant vice in the screening program.

Respondents state that they will bar admission to applicants who "espouse illegal aims" [22] or who have espoused such aims in order to safeguard clients and courts from the possibility of unethical behavior by attorneys who have such political leanings. Ohio's blanket exclusion for past political acts bears close resemblance to the classic systems of prior restraint, where *all* future speech, lawful and unlawful, is prohibited to ensure that no unlawful speech will take place. See, *e.g., Carroll* v. *Princess Anne.,* 393 U.S. 175; *Schneider* v. *State,* 308 U.S. 147, 164; *Kunz* v. *New York,* 340 U.S. 290; *Thornhill* v. *Alabama,* 310 U.S. 88, 106; see generally McKay, *The Preference for Freedom,* 34 N.Y.U.L. Rev. 1182, 1184, 1191-1193.

Certainly, not all applicants who have "espoused illegal aims," assuming that such speech is unlawful, pose an imminent danger of engaging in unethical practice upon admission, See *supra,* p. 17. We see no justification for, and the Bar can ill afford the prior and complete restraint on these applicants from speaking and acting as attorneys.

Finally, there is the insistent question as to exactly what are the interests which Ohio seeks to protect. Upon realistic appraisal, it is difficult to conceive of the way a lawyer, as such, endangers the public safety. Countryman, *supra* at 156-157. Certainly, any threat of danger to clients or courts from "disloyal" attorneys is remote. Hence, the state is amply protected by the "less restrictive alternative" available in criminal or disciplinary sanctions. See *LSCRRC* v. *Wadmond, supra* at 149 (Motley, J. concurring and dissenting); *cf. Stanley* v. *Georgia,* 394 U.S. 557, 566-567; *Kunz* v. *New York, supra* at 295; *Thornhill* v. *Alabama, supra* at 106; *United States* v. *Spock,* — F. 2d — (1st Cir., decided July 11, 1969 [slip opinion at p. 4, n. 5 (majority) and at pp. 46-49 (Coffin, J. dissenting)].

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[22] See Respondents' Brief in Opposition to Petition, p. 13 (hereinafter "Res. Br.").

Where the choice is between a political screening program of the kind Ohio has established and subsequent punishment for defined conduct, in the context of actual and not imagined injury to state interests and under procedures ensuring a fair, speedy and reliable determination, we believe this Court will hold with Mr. Justice Brandeis that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of law. . . ." *Whitney* v. *California*, 274 U.S. 357, 378 (concurring).

2. Ohio's Political Test for Admission is Unconstitutionally Vague and Overboard.

The substantive political test for admission to the Ohio Bar was revealed, for the first time—at least with respect to petitioner, in respondents' Brief in Opposition to the Petition (Res. Br. p. 13). Petitioner was therefore subjected to political interrogation without ever having been informed of the purpose for which he was being interrogated. *Cf. Watkins* v. *United States*, 354 U.S. 178. This, of course, is not an unusual practice in the field of political testing; frequently the political crime for which an individual has been subjected to investigation is left for the investigator to define at the completion of the investigation. See *e.g., The Proposed Anti-Communist Oath: Opposition Expressed, supra* at 125.

The test announced in respondents' Brief proscribes "espous[al] of . . . illegal aims" by an applicant either at the time he was a member of an "organization which espoused illegal aims" or at the time he presents his application for admission.

There are obvious defects in this test, such as absence of the requirement that the applicant's espousal coincide with that of the organization (compare *LSCRRC* v. *Wadmond, supra* at 131) which may be accountable to the fact that the test has never been formalized by statute, judicial rule or administrative regulation.

Other defects, however, evidence fundamental misconceptions regarding the scope of the First Amendment's protection of free speech . Even assuming that "espouse" means "advocate" and "illegal aims" means "violent overthrow of government," the political test is unconstitutionally overbroad under the decisions of this Court.

First, Ohio's test fails to observe the critical distinction between "mere advocacy" and "advocacy directed to *inciting or producing imminent* lawless action *and* is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447, 448, 449 n. 4 (emphasis added). In thus failing, the test "sweeps within its condemnation speech which our Constitution has immunized from governmental control," *Brandenburg* v. *Ohio, supra* at 448; from criminal punishment, *Noto* v. *United States*, 367 U.S. 290, 297-298; *Yates* v. *United States*, 354 U.S. 298; and from becoming the basis of a finding of moral or political unfitness, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Keyishian* v. *Board of Regents, supra* at 607.

Second, the Ohio test is defective when applied to the right of association. It does not incorporate the elements of *knowing* membership with *specific intent* to further the organization's aim of violent overthrow by *resort to unlawful conduct or advocacy*. Thus in *Keyishian* v. *Board of Regents, supra*, the Court reached a conclusion fully applicable to this case that "[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion" from the teaching profession and, we add, from the legal profession as well. *Id.* at 606. See also *Robel* v. *United States, supra* at 266; *Elfbrandt* v. *Russell, supra* at 17, 19; *Aptheker* v. *Secretary of State, supra*.

Third, the political test also suffers from vagueness, particularly in the use of the terms "espouse" and "illegal aims."

The ambiguity in the term "espouse" is comparable to the ambiguity of "aid," "support," "advice" and "counsel", terms found to be unconstitutionally vague in *Cramp* v. *Board of Public Instruction*, 368 U.S. 278. In *Cramp*, the Court queried whether a "lawyer who was representing the Communist Party or its members [could] swear with either confidence or honesty," as the oath involved required of teachers "that he had never knowingly lent his 'counsel' to the [Communist] Party?" *Id.* at 286. The Court concluded he could not. Our question is whether a lawyer or law student who was representing or associated with an attorney representing organizations or members of organizations advocating violent overthrow, could with confidence and honesty swear that he had never knowingly "espoused" or advocated the doctrine of violent overthrow. Again, the answer must be no. The vagueness of these terms leaves too much for governmental discretion in this area where experience has shown that attorneys and law students are particularly susceptible to being stereotyped by the political beliefs of their clients and other attorneys with whom they associate. See *Application of Levy*, 214 F. 2d 331 (5th Cir. 1954 rev'd 348 U.S. 978); *Schware* v. *Board of Bar Examiners, supra; Dombrowski* v. *Pfister*, 380 U.S. 479, 495 n. 12; *Loyalty Oaths for Lawyers: Opposition Expressed, supra*, at 125.

Substitution of the word "advocacy" for "espouse" does not, we believe, serve to cure the test's imprecision. *Keyishian* v. *Board of Regents, supra* at 600-601.[23] Inclu-

[23] The term "illegal aims" is particularly imprecise. See *Boyle* v. *Landry*, 280 F. Supp. 938 (D. Ill. 1968) *prob. juris. noted*, 393 U.S. 974, *rearg. ordered*, 395 U.S. 955. On its face it covers a myriad of offenses, some only misdemeanors or administrative violations. The element of violence is not necessarily included; nor are all "illegal aims" imbued with the quality of moral turpitude.

It should also be noted that "membership" in organizations advocating violent overthrow is a notoriously subjective concept. See *Killian* v. *United States*, 368 U.S. 231.

sion of mere advocacy with unlawful advocacy produces the vice inherent in all unconstitutionally vague government regulations—"the risk of unfair prosecution and the potential deterrence of constitutionally protected conduct"—*Cramp* v. *Board of Public Instruction, supra* at 283. For "advocacy" may well be taken to "prohibit [the admission] of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." *Keyishian* v. *Board of Regents, supra* at 599-600.

The test on its face, like the statutes in *Cramp* v. *Board of Public Instruction, supra; Keyishian* v. *Board of Regents, supra;* and *Baggett* v. *Bullitt,* 377 U.S. 360, is so vague as to create a license for arbitrary and discriminatory denial of the right to practice law; *cf. Konigsberg* v. *State Bar,* 353 U.S. 252, 263; *Stromberg* v. *California,* 283 U.S. 359, 369. The mere existence of such a license, with its "potential for arbitrarily suppressing First Amendment liberties" (*Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87, 90-91) is constitutionally intolerable in the area of free expression where the "standards for permissible statutory vagueness are strict." *NAACP* v. *Button, supra* at 432, 433; *Baggett* v. *Bullitt, supra* at 374; *Speiser* v. *Randall,* 357 U.S. 513, 526.

Not only is petitioner's political speech and association exempt from judgment under Ohio's test, but in these circumstances petitioner may not be compelled to take even the first step in the political inquiry—he is exempt from answering associational interrogatories. *Cf. Speiser* v. *Randall, supra* at 529. For Ohio "may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation" to a legitimate state purpose. *Barenblatt* v. *United States, supra* at 127.

Under Ohio's test, exclusion from the Bar may be predicated on protected speech and association. There being nothing legitimate let alone compelling or subordinating about Ohio's interest, the constitutional hinge for political inquiry is broken. See *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539, 546.

3. The Investigational Apparatus Violates the Rule of Precision by Permitting a Political Inquiry Without Probable Cause and Without Other Sensitive Procedural Tools.

a. *The Absence of Sensitive Investigatory Tools.*

The absence in the investigational apparatus of any of the "sensitive tools" (*Freedman* v. *Maryland*, 380 U.S. 51, 58; *Speiser* v. *Randall, supra* at 525) designed to obviate the dangers of political inquiry probably makes this apparatus the most intimidating aspect of the Ohio screening program.

There are no procedural or substantive checks on the breadth or depth of the respondents' inquiry; each applicant is subject to a limitless and roving search of his political life. Akin to a general warrant, the investigatory license claimed by respondents sanctions an indiscriminate search based on their political biases and predilections. The political investigation of applicants is, as respondents admit in their Brief in Opposition (Res. Br. pp. 12-13), merely initiated by the three sweeping, associational interrogatories petitioner refused to answer. An affirmative answer to question 12(g) or a membership disclosed in answer to questions 7 and 13 which evidences, in respondents' purely subjective view, "disrespect or disregard for law" (Res. Br. p. 13) triggers prolonged investigation, unlimited political interrogation and extensive delay in the final determination of the applicant's qualifications.

Respondents are therefore freed of formal or informal restraints to reward those applicants whose political

orthodoxy conforms to that of the respondents' and to penalize non-conforming applicants with intensive political examination. In contrast to the unobstructed road to admission facing an applicant whose "list of associations and clubs raises no question concerning [his] meeting the minimum standards," the applicant who reveals controversial associations is subjected to probing interrogation pursuant to unspoken accusations. Such disclosures automatically transform the undirected inquiry into an accusatory proceeding in which the applicant must prove the lawfulness of his associations or disprove the respondents' assumption of the unlawfulness of the organization involved.

At this point, the inquiry begins to feed upon itself. In response to interrogation—or in a self-exorcising effort to disclose every facet of his membership—an applicant may reveal radical beliefs and speech abrasive to respondents' concept of "respect for law." As a result new and broader areas are opened for respondents' unhesitating exploration.

The dangers in this are highlighted in part by petitioner's experience. During the personal interview conducted by Messrs. Lumpe and Snodgrass, petitioner was asked whether he was presently or had ever been a member "of the Communist Party, of any socialist party, or of the Students for a Democratic Society." Petitioner's answer to these questions was "no." (29a). Petitioner, in effect, also denied membership in any organization included on the "Attorney General's List." (*Ibid.*). The crucial and unsettling question, we respectfully submit that this Court must ask, is what would have been the consequences of petitioner's having acknowledged membership in any of these various organizations.

The converse of the problem relates to the chilling effect of the anticipated interrogation upon the college and law school actions of the applicant. With reputation and em-

ployment opportunities, not to speak of the right to political privacy, at stake, "[i]t would be a bold [attorney or prospective attorney] who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." *Keyishian* v. *Board of Regents, supra* at 601.

We believe that if political fitness is a relevant criterion for admission and a political screening program is a permissible method for determining that fitness, it is imperative that the apparatus implementing this program incorporate standards and procedures to ensure that the process of regulation does not abridge freedom of expression and destroy the very interests which it has been designed to protect.

b. *The Absence of Probable Cause*

As applied, Ohio's statutory-judicial scheme authorizes a limitless and roving search into the personal and political life of every applicant. We have already shown that this sweeping authorization fails to meet the constitutional standard of "precision", *Shelton* v. *Tucker, supra*, where the Court condemned a narrower search as "unlimited and indiscriminate." *Id.* at 490. At this stage, we must treat of a related and equally serious violation of constitutional right: Ohio's invasion of an applicant's personal and political privacy without probable cause or foundation for inquiry.

This is precisely the kind of inquiry against which the Fourth Amendment is directed. For the constitutional prohibition of unreasonable searches and seizures has its historical roots in the investigations of political and religious dissenters—a situation similar to the present problem—at least in the political field. *Boyd* v. *United States*, 116 U.S. 616, 625-628; *Stanley* v. *Georgia, supra* at 598-599 (Mr. Justice Stewart concurring). As Mr. Justice Stewart pointed out in *Stanford* v. *Texas*, 379 U.S. 478, 482, the roots of the Fourth Amendment "go far deeper" than the general war-

rants of the pre-revoluntionary period in this country or in England. They are to be found in the Tudor period where "officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent . . ."

The purpose of the Fourth Amendment was to safeguard the security of individuals against such arbitrary invasion by government officials, particularly in the religious and political areas, clearly the most sensitive to such abuse. The method imposed by the Constitution was the requirement of a warrant based upon probable cause or other reasonable basis for making such an inquiry in a particular case. The issue has been the subject of litigation most frequently in areas of criminal investigation unrelated to the First Amendment for a variety of reasons, including the relative recency of the application of the First Amendment to the States (see *Gitlow* v. *New York*, 268 U.S. 652) and of the incorporation of the search and seizure provisions of the Fourth into the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643.

It is obvious, however, in the light of Anglo-American history, that the principles underlying the Fourth Amendment's proscription of unreasonable searches and seizures should be applied most liberally for the protection of the citizen in the area of the First Amendment. If this is true where even limited disclosures of political associations or activities are involved (see, *e.g.*, *Gibson* v. *Florida Legislative Committee, supra*), it is even more important to apply the rule where, as here, the demanded disclosures are virtually unlimited.

The few cases involving admission to the Bar which have reached this Court have not directly adjudicated this issue; it appears neither to have been directly raised nor to have had an adequate basis for doing so. Thus, in the second *Konigsberg* case the inquiry was a limited one relating to membership in a single named political organiza-

tion; the committee had independent evidence on the subject and the Court noted "gaps in the evidence presented" by the applicant, *supra* at 45. In the *Anastaplo* case, *supra*, where the applicant appeared *pro se*, the Court again was dealing with Communist Party membership, *supra* at 93 n. 154, and referred to the committee's "good faith belief in the need for exploratory or testing questions of the applicant," *supra* at 90. We note these distinctions not to indicate acquiescence in an inquiry with respect even to Communist Party membership, but because it is a distinction which the Court has regarded as material.

Passing the earlier Bar cases, which cast little light upon the issue as it is squarely posed here, the application of the "probable cause" principle to this case is not only consistent with the decisions in the basic search and seizure cases but with this Court's decisions in cases involving other types of governmental investigation into associations.

The point was made most explicitly in an earlier decision of this Court in *Barenblatt* v. *United States, supra* at 134, where Mr. Justice Harlan, after reciting evidence establishing contemnor's membership in the Communist Party, stated:

> "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking any probable cause for belief that he possessed information which might be helpful to the Subcommittee."

Subsequently, in *Gibson* v. *Florida Legislative Committee, supra* at 537, the Court prohibited an invasion of associational privacy in the absence of "an adequate foundation for inquiry."[24] Such a foundation, said the Court "is an essential prerequisite to demonstrating the im-

[24] In addition to the term "foundation," the Court characterized the requirement by such descriptive terms as "nexus" and "probable cause," *Gibson* v. *Florida Leglislative Committee, supra* at 545.

portant, substantial and subordinating state interest necessary to sustain its right of inquiry . . .," *id.* at 553; the dissenting opinion in that case did not question this general principle but differed as to whether a foundation had not, in fact, been laid by the Committee's witnesses, *id.* at 578. Mr. Justice Douglas, concurring, stated:

> "Whether the problem involves the right of an individual to be let alone in the sanctuary of his home or his right to associate with others for the attainment of lawful purposes, the individual's interest in being free from governmental interference is the same, and, except for the limited situation where there is 'probable cause' for believing that he is involved in a crime, the government's disability is equally complete." *Id.* at 569.

Such a foundation, this Court has held, must be established upon independent,[25] relevant [26] and substantial [27] evidence. *Cf. Uphaus* v. *Wyman,* 360 U.S. 72, 79.

This case is an even stronger one than *Gibson* for requiring an adequate foundation. The respondents are not merely collecting data for future legislation; they are possessed of an adjudicatory power to determine whether an applicant has engaged in unlawful political conduct. See *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96. Since a proceeding which involves such a determination is by its nature accusatory—the applicant is the target of investigation—absence of an adequate foundation violates the applicant's due process rights to notice of charges and

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[25] *Sweezy* v. *New Hampshire, supra* at 255, 261 (Mr. Justice Frankfurter and Harlan concurring).

[26] *De Gregory* v. *New Hampshire Attorney General,* 383 U.S. 825, 830.

[27] *Gibson* v. *Florida Legislative Committee, supra* at 555, 556 and n. 7; *Speiser* v. *Randall,* 357 U.S. 513, 529.

to confrontation.[28] *Cf. In re Ruffalo*, 390 U.S. 544, 550-551; *Jenkins* v. *McKeithen*, 395 U.S. 411.

The unjustified and unwarranted intrusion into the privacy of applicants would be a novel doctrine even if this case involved the most compelling state interests—public health and public safety; see *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *Seattle*, 387 U.S. 541; *Katz* v. *United States*, 389 U.S. 347; *Mapp* v. *Ohio*, 367 U.S. 643. Admission to the Bar does not, however, involve any comparable damage to the state. On the contrary, the danger is to the subject of the search, who has been and is subjected by this intrusion to a prior restraint in the exercise of his First Amendment rights. See *Marcus* v. *Search Warrant*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Freedman* v. *Maryland*, 380 U.S. 51; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 155 n. 4, 159 (Mr. Justice Harlan concurring).

c. *The Particular Questions Put to Petitioner Are Improper.*

The mere recitation of the questions directly in issue here indicate their constitutional inadequacy. One question inquired as to past membership in "any" organization which "advocates the overthrow of the government of the United States by force," *supra*, p. 5. The other two called for the "names and addresses of all clubs, societies or organizations of which you are or have been a member, *supra*, p. 6. One was limited to the period beginning with registration as a law student, the other had no time limitation.

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[28] In due process terms, there is no logical distinction between disbarment and denial of admission; both affect substantial, legal interests of the individual. See *In re Ruffalo*, 390 U.S. 544; *Hallinan* v. *Committee of Bar Examiners*, *supra*; *cf. Greene* v. *McElroy*, 360 U.S. 474; *Schneider* v. *Smith*, *supra* at 25; *Speiser* v. *Randall*, *supra* at 525-526; *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191.

1. These questions constitute the type of "unlimited or indiscriminate search" condemned by this Court in *Shelton* v. *Tucker,* 364 U.S. 479. There, the Court upheld the right of teachers to resist inquiry into all their associations over a five-year period. The Court characterized the inquiry as "unlimited" because, like the present interrogatories, it compelled a teacher to "list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious." *Id.* at 488.

The instant case involves two questions covering "every conceivable organizational tie" (*supra*, p. 6), one of which is more defective than those in *Shelton* since it covers petitioner's entire lifetime (*ibid*).

Such a sweeping survey of a man's life violates his associational rights under the First Amendment because it rounds up more information than is relevant or material to any legitimate state interest and because it touches many areas in which the state has no interest at all. See *NAACP* v. *Alabama*, 357 U.S. 449; *Bates* v. *Little Rock*, 361 U.S. 516.

Schneider v. *Smith*, *supra*, reaffirmed the *Shelton* principle in the context of political interrogatories quite similar to those involved here. While in *Schneider* the Court found that there was no statutory authorization for the political inquiry undertaken by the Coast Guard Commandant, it did so in the context of recognizing the associational infringement worked by compelling an applicant for a seaman's license to affirm or deny membership in 250 listed organizations. The problem was confronted directly by Mr. Justice Fortas in his concurring opinion, joined by Mr. Justices Black and Stewart:

> "Reversal is dictated because the interrogatories which petitioner refused to answer offend the First Amendment. *Shelton* v. *Tucker, supra.* (They also pass the outermost bounds of reason. No agency may be permitted to require of a person, subject

> to heavy penalty, sworn essays as to his 'attitude toward the form of government of the United States' or 'full particulars', under oath, without time limit, as to contributions made and functions attended with respect to 250 organizations.)" *Id.* at 489.

Question 12(g) alone sweeps more broadly into associational privacy than the interrogatories rebuked by the Court in *Schneider*. In contrast to the *Schneider* inquiry concerning membership in 250 organizations, question 12(g) herein seeks an applicant's affirmation or denial of membership, no matter how stale,[29] in an unlimited number of organizations, whose purposes he must guess at his peril. If he affirms membership under 12(g) the applicant is directed to immediately give a full and detailed explanation.

The purely roving nature of the three Ohio interrogatories is all the more reprehensible because a negative answer to 12(g), or an innocuous list of organizations disclosed in answer to 7 and 13 are more than information which the respondents improperly secure only to discard. Rather, respondents admit that they use such information as evidence that an applicant's associations "[raise] no questions" (Res. Br. p. 13) and that he has a safely orthodox or apolitical background. Not only is it most unreasonable for respondents to ascertain political character by this process of inverse reasoning, but it places a premium upon a showing of conventional associations, for it provides the basis for respondents' practice of selectively intensifying the political examination for those applicants whose political associations do not conform to respondents' standard of orthodoxy.

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[29] See *DeGregory* v. *New Hampshire Attorney General, supra.* This Court has occasion to consider a related aspect of staleness—that relating to the possibly changing purposes of organizations. *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, 380 U.S. 513.

The Court's conclusion in *Shelton* v. *Tucker*, *supra* at 490, is equally applicable to Ohio's associational inquiries. For they plainly constitute a "comprehensive interference with associational freedom [which] goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency" of applicants to its Bar.

2. In addition to being invalid under *Shelton* v. *Tucker*, *supra*, and *Schneider* v. *Smith*, *supra*, question 12(g)'s inquiry concerning membership in organizations advocating the overthrow of government by force suffers from other constitutional infirmities.

(a) The most obvious defects are the two pointed out by Judge Friendly in *LSRRC* v. *Wadmond*, *supra* at 131 with respect to a similar New York question,[30] namely, first, that 12(g) does not require the organizational advocacy to coincide with the applicant's period of membership, and second, that it is not limited "to cases where the applicant knew of the teaching or advocacy." *Ibid.* Again, it is the question's potential for sweeping in associational ties having no bearing on the moral and political fitness of applicants which prompted Judge Friendly's conclusion that the state's interest "can be adequately protected by a question more narrowly phrased." *Ibid.*

(b) There are fundamental defects, however, in question 12(g) which cannot be erased by the narrow phrasing Judge Friendly sugests.

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[30] "26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? — If you answer is in the affirmative, state the facts below."

See *LSCRRC* v. *Wadmond*, *supra* at 129.

The question is not restricted in its coverage to organizations whose advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." See *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 and n. 2, 448-449. Therefore, as we stated earlier, Ohio's regulation fails to "observe the established distinction between mere advocacy and incitement to imminent lawless action." *Id.* at 449 n. 4. In short, the question's breadth violates the rule of precision because it compels disclosure of ties with organizations having purely lawful purposes. Such associations have no relevance to any legitimate criteria for admission. *Cf. Sweezy* v. *New Hampshire*, *supra* at 266 (Mr. Justice Frankfurter concurring).

Likewise, 12(g) violates the rule of precision because it is not confined to membership (i) with specific intent to further the unlawful purposes of an organization (ii) by resort to advocacy "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" or other unlawful conduct. *Brandenburg* v. *Ohio*, *supra*; *Yates* v. *United States*, 354 U.S. 298, 321-322.

Recognizing that "[a] number of complex motivations may impel an individual to align himself with a particular organization" (*United States* v. *Robel*, *supra* at 266 n. 16) it would be unreasonable to infer unlawful membership from mere knowing membership for the purpose of justifying an unlimited search into the nature and circumstances of membership. Ohio may neither deny an applicant's admission, nor single him out for an intensive investigation having accusatory overtones on the basis of lawful speech and association. A contrary rule would invest respondents with an unbridled power to discriminate against an applicant whose speech or associations they disapprove by rigorous political examination and limitless intrusion into political privacy.

(c) Upon giving an affirmative answer to question 12(g) an applicant is automatically required to explain fully, in detail and to respondents' satisfaction the nature and circumstances of his membership. In effect, a presumption of unlawful membership arises from disclosure of mere knowing membership which the applicant bears the burden of rebutting by demonstrating the lawfulness of his association, and more broadly, his "loyalty."

To overcome the presumption against him, the applicant is compelled to reveal every facet of his association to respondents' scrutiny. He must then submit to probing interrogation testing his assertion of non-knowing membership or his denial that he or the organization "espoused" or in fact ever had illegal aims. This quite naturally leads to a thorough review of the applicant's beliefs and entire political background.

This procedure has four elemental defects.

(i) A presumption of unlawful membership derived from the mere fact of knowing membership is irrational and the applicant may not be constitutionally required to bear the burden of rebutting it.

The presence of First Amendment considerations requires strict application in this case of the principle announced in *Tot* v. *United States*, 319 U.S. 463 that a "presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed." *Id.* at 467-468. *Cf. Speiser* v. *Randall*, *supra*. Respondents' presumption has been undercut by this Court's declaration that it is "an assertion of arbitrary power" (*Wieman* v. *Updegraff*, *supra* at 191) to automatically infer, as respondents have, that all knowing members of the Communist Party, for example, share its illegal purposes or participate in its illegal conduct. See *Schware* v. *Board of Bar Examiners*, *supra* at 246; *United States* v.

Brown, 381 U.S. 437, 456. Further, as the Court stated in *Schneiderman* v. *United States*, 320 U.S. 118, 136:

> "Under our traditions, beliefs are personal and not a matter of mere association, and men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms of asserted principles."

In light of these findings, it plainly strains "the circumstances of life as we know them" (*Tot* v. *United States*, *supra* at 468) to find a taint, as respondents have, on every applicant who answers 12(g) affirmatively.

(ii) An affirmative answer to 12(g) impermissibly casts the burden on the applicant of proving the legality of his association. The vice of this procedure was condemned in *Speiser* v. *Randall*, *supra*:

> "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, *cf. Dennis* v. *United States*, *supra*, provide but shifting sands on which the litigant must maintain his position. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." *Id.* at 526.

This procedure was also the subject of Circuit Judge Wright's concurring opinion in *Haskett* v. *Washington*, *supra*. Judge Wright held that teachers refusing to swear to an oath of non-membership in organizations advocating violent overthrow could not constitutionally be compelled to bear the burden of rebutting an adverse presumption arising from such refusal.

If, as in *Speiser*, an applicant for a property-tax exemption may not be required to submit to the procedure we

complain of here because it inhibits the exercise of First Amendment rights, can there be any question but that the same right is enjoyed by an applicant to the bar who, after undergoing a long and expensive period of training and with his profession and reputation at stake, confronts this procedure.

(iii) The presumption of unlawful membership arising from an affirmative answer to 12(g), like a similar presumption considered in *Keyishian* v. *Board of Regents*, *supra* at 608, is irrebutable. *Ibid.*

In *Keyishian*, the Court invalidated a New York statute making membership in the Communist Party or in any organization that advocates violent overthrow *prima facie* evidence of disqualification from teaching in the public schools. The teacher could only rebut the presumption by denying membership, by denying that the organization advocated violent overthrow or by denying that he had knowledge of such advocacy. "Thus proof of non-active membership or a showing of the absence of intent to further unlawful aims", the Court concluded, "will not rebut the presumption and defeat the dismissal." *Id.* at 608.

Under the Ohio scheme, an applicant may overcome the presumption and establish his innocence only by (1) denying the membership, (2) denying that the organization had illegal aims, or (3) denying that he "espoused then or now" such illegal aims. Thus, it would serve no purpose for an applicant to prove (1) that he had no knowledge of the organization's unlawful aims, (2) that his "espousal" was not directed toward inciting or producing imminent lawless action and likely to produce or incite such action or (3) that he lacked the specific intent to further the organization's illegal aims by resort to unlawful speech or conduct. While these elements are essential to defining criminal associations, Ohio takes no account of them in its standard. As such, Ohio's standard, like the statute in *Keyishian*,

"sweep[s] overbroadly into association which may not be proscribed." *Keyishian* v. *Board of Regents, supra* at 608.

(iv) A further pernicious feature of this presumption is that respondents' determination that an organization advocates violent overthrow is not the product of an actual review of the organization's history or purposes made under the procedural safeguards demanded by *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123. Respondents therefore are free to assume that advocacy of violent overthrow is the purpose of any number of organizations. As illustrated by petitioner's experience in being questioned about membership in the Communist Party, any socialist party, Students for a Democratic Society or any organization on the "Attorney General's List", the respondents judge an organization by its controversial nature, or by their own or some other governmental agency's political biases.

As a consequence, an applicant may be forced to bear the burden of demonstrating the lawful character of an organization to which he belongs, even though there is no evidence or support for the respondents' determination that it advocates violent overthrow.

An analogous procedure was considered in *Dombrowski* v. *Pfister*, 380 U.S. 479 and held invalid. In contrast to respondents' open-ended and fluctuating "designation" of organizations advocating violent overthrow, *Dombrowski* concerned the comparatively narrow list of Communist-front organizations compiled by the Attorney General of the United States, the Subversive Activities Control Board or the committees and subcommittees of Congress. Appellants in *Dombrowski* sought invalidation of a Louisiana statute creating criminal penalties for failure to register as a member of a Communist-front organization as defined by another statutory provision. Listing by the foregoing agencies was made presumptive evidence that an organization was a Communist-front; the presumption was not lim-

ited to organizations cited after compliance with the requirements of *Anti-Fascist Committee* v. *McGrath, supra.*

The Court ruled that:

> "A designation resting on such safeguards is a minimum requirement to insure the rationality of the presumptions of the Louisiana statute, and in its absence, the presumptions cast an impermissible burden upon the appellants to show that the organizations are not Communist fronts." *Dombrowski* v. *Pfister, supra,* at 496.

The same irrationality inheres in 12(g). In the absence of a prior determination made under the procedural safeguards outlined in *Anti-Fascist Committee* v. *McGrath, supra,* respondents may not reasonably presume that an organization in which an applicant held or holds membership advocates violent overthrow; nor may it reasonably compel the applicant to establish the lawful character of that organization.

D. The Power to Judge the Morality of An Applicant's Political Activities Can Never Be Adequately Circumscribed to Avoid Abuse

We believe that infringement of the First Amendment rights of applicants is not so much the fault of respondents as it is the unavoidable consequence of their undertaking. For there is substantial question as to whether the power to determine political fitness can ever be delegated and administered with constitutional precision. In *Schware* v. *Board of Bar Examiners, supra,* this Court found that the standard for political disqualification requires a finding of moral turpitude in connection with illegal political conduct. *Id.* at 242-243). The difficulty in defining or implementing this standard is compounded by the further requirement that the moral implications of an applicant's political conduct must be assessed in terms not only of contemporary but future community values. See *Schware* v. *Board of Bar Examiners, supra; Hallinan* v. *Committee of Bar Examiners, supra,* at 86-87. Even if the respondents could exclude

subjectivity from their judgments, the task of making a determination is overwhelming particularly in the area of political activities, where community standards are inevitably in a state of constant flux. But, in reality, the power to review the morality of another's political conduct is an open invitation to caprice and arbitrariness.

E. Petitioner Was Denied Due Process of Law Because There Is No Evidence in the Record That He Obstructed the Respondents' Investigation

Respondents justify denying petitioner's admission on the grounds that he *obstructed* their investigation of his character; but neither the committee nor the court below made findings of fact, as constitutionally required, to support their bald conclusion of obstruction. See *Wood* v. *Georgia,* 370 U.S. 375, 386-387; *Schware* v. *Board of Bar Examiners, supra* at 239.

Nor did respondents make any effort before this Court to explain in particular how petitioner obstructed the investigation. As illustrated by their Brief in Opposition to the Petition, respondents' case of obstruction is nothing more than conjecture: "[T]he requested information *may* provide a valuable insight (Res. Br. at 12) . . . the answers *might* show little need to proceed further (ibid.) . . . knowledge of such organizations and associations *might* well direct the committee's attention to persons familiar to them who have known the applicant" (*id.* at 13) (emphasis supplied).

This case is wholly unlike *Konigsberg* v. *State Bar, supra.* There are no "gaps" to fill here, and the record concerning the petitioner's political fitness is not in a state of "uncertainty." *Id.* at 45, 46. To the contrary, on the basis of this record, respondents' insistence that petitioner answer the three questions is merely *pro forma.* The information sought by these questions was already in respond-

ents' hands *via* the New York questionnaire which contained similar questions which petitioner had answered. Furthermore, petitioner's refusal could hardly be termed obstruction, since he answered the committee's questions concerning particular associations. Compare *Konigsberg* v. *State Bar, supra* at 39 [applicant refused "to answer *any* questions relating to membership in the Communist Party" (emphasis supplied)].

POINT II

PETITIONER'S ASSERTION OF HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION SHOULD BE SUSTAINED.

The issues previously presented pose most serious problems relating to the right of association, the independence of the Bar and freedom from intrusion guaranteed by the First Amendment which, it is hoped, will resolve the issues in this case. We, however, believe it important as well that there be explicit recognition of the right of applicants to decline to answer questions based upon their constitutional privilege against self-incrimination. This ground, separately stated in petitioner's response to the committee and in this Court, is an independent basis for an attack upon Ohio's actions.

Petitioner had a constitutional right under the Fourteenth Amendment, incorporating the Fifth, to assert his privilege against self-incrimination in Ohio's inquiry. There is no need at this late date for a discussion of the history, scope and proper construction of the privilege. This Court has discussed the matter in recent years in cases ranging most notably from *Emspak* v. *United States,* 349 U.S. 190, to *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of the City of New York,* 392 U.S. 280; see also *Quinn* v. *United States,* 349 U.S. 155. It has extensively explored the policies underlying the privilege, *Ullman* v. *United States,* 350 U.S. 422. It has broadly construed it in *Marchetti* v. *United States,* 390 U.S. 39 and

Leary v. *United States*, 395 U.S. 6. It has held it applicable to the states in *Malloy* v. *Hogan*, 378 U.S. 1 and *Garrity* v. *New Jersey*, 385 U.S. 493. It has applied it specifically to members of the bar in *Spevack* v. *Klein*, 358 U.S. 511.

Last term this Court held that the privilege was available to all public employees, *Gardner* v. *Broderick*, 390 U.S. 918; *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of the City of New York*, *supra*. It applies to all forms of interrogation in the absence of a statutory grant of immunity.[31] There is and could be no question as to petitioner's good faith in asserting that privilege in the light of the nature of the associational questions asked and the existence of both state and federal statutes in the area of sedition.

The constitutional position of an applicant for membership in the Bar is at least as strong as that of a public employee. This Court in *Spevack* v. *Klein*, *supra*, held that a member of the bar was entitled to assert his privilege; some members of the Court suggested that that right might be superior to that of a public employee. Undoubtedly, the Court had in mind the long tradition, particularly in the New York courts, of upholding the constitutional privilege for members of the Bar. See, *e.g.*, *Matter of Grae*, 282 N.Y. 428; *People* v. *Kaffenburgh*, 188 N.Y. 49; *Matter of Ellis*, 282 N.Y. 435.

The same right should pertain to applicants for admission to the Bar who, like lawyers, are not public employees (see *Cammer* v. *United States*, 350 U.S. 817) and who are entitled to the full exercise of their constitutional rights. Courts and commentators have noted in other con-

[31] See the illuminating decision of the District Court in the aftermath of this Court's decision in *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, *supra*,—Judge Tyler's opinion No. 36142, *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of the City of New York*, 66 Civ. 4307 (S.D.N.Y. 1969), unreported, copies of which have been filed with the Clerk of this Court.

nections the penalizing effect of a denial of admission to the Bar after years of legal studies and have assimilated the character requirements of admission to those of retention of status as a member of the Bar. See, *e.g.*, *Hallinan* v. *Committee of Bar Examiners, supra,* and Note, *Admission to the Bar Following Conviction for Refusal of Induction, supra.*

Finally, it should be noted that this case does not involve even the narrow accounting of stewardship referred to in the opinion of this Court in *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation, supra* at 280, 285. The unrestricted scope of the inquiry in Ohio makes this an even more appropriate case for the assertion and the vindication of the privilege against self-incrimination. The same free-wheeling inquiry which infringes upon an applicant's freedom of association furnishes a most appropriate foundation, by the magnification of the perils, for the assertion of the constitutional privilege against self-incrimnation.

CONCLUSION

The order below should be reversed with instructions to admit petitioner to the Ohio Bar Examination.

Respectfully submitted,

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DAVID ROSENBERG
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November 10, 1969

APPENDIX A

Rule XVII: Admission to the Practice of Law

Section 1. General Requirement.

Except as provided in Section 8 of this rule, to be admitted to the practice of law in Ohio, a person must

(A) be a citizen of the United States;

(B) be 21 years of age;

(C) have earned, prior to admission to law school, a bachelor's degree approved by the Court or earned in a college or university approved by one of the following accrediting associations: Middle States Association of Colleges and Secondary Schools, New England Association of Colleges and Secondary Schools, North Central Association of Colleges and Secondary Schools, Northwest Association of Secondary and Higher Schools, Southern Association of Colleges and Secondary Schools, and the Western College Association;

(D) have a degree from a law school which is approved by the American Bar Association and if located in Ohio, is also a member of the League of Ohio Law Schools;

(E) be approved as to character under procedures provided in this rule;

(F) have passed an examination conducted by the Ohio Board of Bar Examiners; and

(G) have taken the oath of office.

Section 2. Preliminary Registration Requirements.

(A) Every person who intends to take the Ohio bar examination shall file with the Clerk of this Court, within 120 days after entering law school, an application for registration as a candidate for admission to the practice of law

on a form prescribed and furnished by the Court. The application shall be accompanied by

(a) a certificate of the dean of the law school showing that the applicant has begun the study of law;

(b) a properly authenticated transcript of college credits showing that prior to admission to law school the applicant has earned a bachelor's degree;

(c) a character questionnaire in duplicate prescribed and furnished by the Court;

(d) a fingerprint identification on the form used by the Federal Bureau of Investigation; and

(e) a registration fee of twenty dollars. (Effective Sept. 1, 1963.)

Section 3. Character Investigation.

(A) The president of each local bar association shall appoint a Committee on Applicants for Admission to the Practice of Law consisting of three or more members each of whom shall serve without compensation for a term of three years. One-third of the committee member's terms shall expire each year. These committees shall be responsible for investigating the character, reputation and moral qualifications of applicants and shall report their findings and recommendations to the Clerk of this Court.

(B) If the applicant is a resident of Ohio, one copy of the questionnaire required by Section 2 shall be forwarded by the Clerk to the Committee on Applicants for Admission to the Practice of Law in the county where the applicant claims permanent residence.

(C) In conducting the investigation, the local committee shall utilize the applicant's character questionnaire and

shall also obtain answers to questionnaires from three citizens in the county, none of whom is related to the applicant. Two members of the committee shall personally interview the applicant and record the results on a form prescribed by the Court.

(D) This Court shall determine from the report of the local bar association committee and from other available information whether the applicant shall be accepted for registration. The Clerk shall notify each applicant concerning the acceptance or rejection of the application.

(E) If the applicant is a nonresident, the Clerk shall take such steps as are feasible to provide for character investigations as nearly as possible in conformity to the above procedures.

Section 4. Application for Examination.

(A) Applications to take the examination shall be filed with the Clerk of this Court at least 90 days before the time fixed for the examination. Each application shall be accompanied by

(a) the applicant's affidavit that he has read and studied the Canons of Professional Ethics adopted by the American Bar Association and approved by this Court;

(b) a certificate from the law school that the applicant has or will have received a law degree, is a person of good moral character, has sufficient knowledge and ability to discharge the duties of an attorney at law and has received instructions in legal ethics;

(c) a questionnaire in triplicate furnished by the Court updating the information on character and moral fitness furnished at the time of registration; and

(d) a fee of forty dollars refundable only in the event of disapproval. (Effective September 1, 1963.)

(B) This Court shall pass on the application and the Clerk shall notify the applicant of the Court's approval or disapproval.

Section 5. Bar Examination.

(A) The bar examination shall be prepared and conducted under the direction of the Board of Bar Examiners appointed by the Court and consisting of ten members of the bar of Ohio. The members of the board shall serve terms of five years and shall be so appointed that the terms of two examiners will expire each year.

(B) Two examinations shall be held each year in Columbus. One shall begin on the first Tuesday in March and the other on the last Tuesday in July. Each examination shall continue for three days and shall be divided into six half-day sessions. Each examiner shall prepare and submit five questions, of which the applicants shall answer four. The subject matter of the questions shall not be designated or labeled.

(C) The examination shall consist of the following:

Subjects	*Number of Questions*
Business Associations (including Agency, Partners and Corporations)	8
Constitutional Law	5
Contracts	5
Criminal Law	2
Equity, Trusts and Wills	8
Evidence	5
Negotiable Instruments	2
Property (Real and Personal)	5
Pleading and Practice	5
Torts	5

(D) No applicant shall be admitted to the practice of law unless a grade of 75 per cent is received on the examination. The grades as determined by the Board of Bar Examiners shall be final.

(E) The Board of Bar Examiners may, subject to the approval of the Court, promulgate additional rules to aid in the conduct of the examinations.

Section 6. Re-Examination.

(A) Applicants for re-examination may apply for admission to the March examination only. No applicant will be admitted to more than three examinations.

(B) Applications must be filed with the Clerk of this Court at least 90 days before the time fixed for examination.

(C) Before being admitted to the examination, the applicant must again be approved by the local Committee on Admissions to the Practice of Law.

(D) Each application for re-examination, submitted on a form prescribed by the Court, must be accompanied by a fee of sixty dollars refundable only in the event the application is disapproved. The fee for a second re-examination is seventy dollars.

Section 7. Induction to the Bar.

(A) Each successful applicant and each person admitted under Section 8 must sign a roll designating his residence and take the following oath of office:

I Do Solemnly Swear:

I will support the Constitution of the United States and the Constitution of the State of Ohio;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense ex-

cept such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client and I will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality and advance no pact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed or delay any man's cause for lucre or malice. So HELP ME GOD.

(Clerk's note: This form of oath was adopted January 25, 1910. It is the form recommended by the American Bar Association.)

(B) A fee of ten dollars shall be charged for each certificate of admission. A charge of one dollar shall be made for a duplicate certificate of admission.

Section 8. Admission Without Examination.

(A) An applicant for admission to the practice of law in Ohio without examination must file the following with the Clerk of this Court:

(a) a certificate of admission as an attorney at law in the highest court of another stae or in the District of Columbia;

(b) a certificate, signed by a judge of a court of record of the state from which he seeks admission, indicating that the applicant is of good moral character and is in good standing in the bar of that state;

(c) certificates evidencing education equal to the requirements prescribed by this Court for admission to the practice of law in Ohio in effect at the time the applicant was admitted in such other state;

(d) evidence showing that applicant has, for at least five years, engaged in legal work of such character and description as shall satisfy this Court that the applicant possesses the legal skills deemed adequate for admission to the practice of law in Ohio without examination;

(e) a certificate by an attorney at law of this state that the applicant is of good moral character and recommending him for admission to the practice of law in Ohio;

(f) applicant's affidavit that he is a citizen of the United States and that he is a resident of this state or intends to come into the state for the purpose of making it his permanent residence (if the applicant is not a resident of Ohio, his certificate shall not be issued until he has established residence in this state);

(g) an application and questionnaire, in duplicate, for use by the National Conference of Bar Examiners in making a character investigation;

(h) a fingerprint identification card on the form used by the Federal Bureau of Investigation;

(i) a nonrefundable fee of one hundred and fifty dollars.

(B) This Court shall pass on the application, and the Clerk shall notify the applicant of the Court's approval or disapproval.

RESPONDENT'S

BRIEF

FILE COPY

DEC 5 1969

JOHN F. DAVIS, CLERK

Supreme Court of The United States

October Term, 1969

No. 18

In the Matter of the Application of
MARTIN ROBERT STOLAR,
Petitioner.

Brief For Respondents

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Supreme Court of The United States

October Term, 1969
No. 75

In the Matter of the Application of
MARTIN ROBERT STOLAR,
Petitioner.

BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISION INVOLVED

The only constitutional provision which has been properly and timely brought in issue is the Fifth Amendment of the United States Constitution. That is the only basis given by petitioner for his refusal to answer the questions involved herein.

QUESTION PRESENTED

Petitioner has not accurately stated the questions presented for review. The constitutional issues claimed by petitioner have no basis under the facts of this case.

The admissions committee of the Columbus Bar Association was investigating petitioner to determine whether or not he possessed the necessary qualifications to be admitted to the practice of law in this state. Petitioner refused to answer questions designed to provide relevant information necessary for such determination. He therefore obstructed the investigation of the Bar committee and prevented it from making the required determination.

The only question properly presented for review is whether an applicant for the Ohio Bar may refuse to answer questions relative to his qualifications thus preventing a proper determination of those qualifications to practice law, and base this refusal on the Fifth Amendment of the Constitution. The question is not presented

as to whether the applicant would have been excluded had he answered such questions. The constitutional issues stated by applicant as "Questions Presented" in his Brief, are therefore not involved in this case.

ARGUMENT

The people of the State of Ohio have a vital and substantial interest in the quality and ability of persons admitted to the practice of law in Ohio. It is important that only those persons who possess the required qualifications, including moral qualifications, be permitted to practice law. The people of Ohio, by constitutional mandate, have placed on the Supreme Court of Ohio the responsibility for insuring that those admitted to the practice of law are properly qualified.

Requiring all attorneys to be properly qualified is necessary not only to assure the orderly and efficient administration of the law, but also to assure the public of proper representation. This becomes more and more important as society becomes more complex and the law touches the lives of more people. There are few areas of activity which do not have serious legal implications. People must therefore rely more upon attorneys to guide their conduct and to protect their interests. The public often has no way of determining the qualifications of an individual attorney. People must, therefore, be able to assume that all persons who are licensed by the state to practice law are trustworthy and possess the required skills.

The authority and responsibility conferred upon attorneys is extraordinary. Attorneys in criminal cases are entrusted with the lives and liberty of their clients. In civil litigation they have apparent authority to stipulate facts and negotiate and enter into settlements for their clients. Attorneys, by virtue of their profession are more

likely to be appointed trustees, guardians, or administrators. Numerous other examples of their authority could be given. Mr. Justice Frankfurter, in his concurring opinion in *Schware v. Board of Bar Examiners,* 353 U.S. 232 at 247 (1957) defined the position of lawyers as follows:

> • • • [A]ll the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, or granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character'.

This Court has recognized the need for requiring high standards of qualifications, including moral qualifications, for admission to the practice of law and the right of the State to exclude applicants who lack such qualifications. *Schware* v. *Board of Bar Examiners,* 353 U.S. at 239; *Konigsberg* v. *State Bar of California,* 366 U.S. 36 at 40-41 (1961); *In Re Anastaplo,* 366 U.S. 82 (1961).

The Supreme Court of Ohio works through the admissions committees of the local bar associations to investigate the qualifications of applicants to practice law in Ohio. In the instant case the admissions committee of the Columbus Bar Association was responsible for investigating petitioner. This committee is made up of practicing attorneys who contribute their time and efforts. Their work was appropriately described by Mr. Justice Goldberg in his concurring opinion in *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 107 (1963) as follows:

> • • • Committe members are usually unpaid and serve in fulfillment of their obligation to the profession

> and as officers of the court. They perform an indispensable and very often thankless task. While the vast majority of candidates are approved without difficulty, in exceptional cases, such as this, either information supplied by the applicant himself or material developed in the course of the committee's investigation gives rise to questions concerning the applicant's moral character. * * *

As a practical matter, the admissions committee and its members who contribute their time and efforts, cannot make an extensive independent investigation of each applicant. This is especially true in situations where, as here, the applicant is not a resident of the state. It must obtain the required information in some other way. Much of the information relative to his fitness is under the control of the applicant. The admissions committee must be able to require the applicant to furnish such information. The committee, however, is not limited to the information which the applicant wishes to volunteer. Neither is it bound by the evidence produced by the applicant. In either case it is unlikely that it would ever learn the negative aspects of applicant's character and conduct. If the committee wishes to properly determine which candidates are properly qualified, it must be able to obtain all the relevant information. It, therefore, requires the applicant to answer certain questions designed to produce this information. *In Re Anastaplo,* 366 U.S. 82 U.S. at 90 (1961).

Both written questionnaires and personal interviews have historically constituted means of determining the qualifications of applicants. This Court has recognized the desirability of such questioning and described it as follows:

> * * * This interrogation may well be of decisive importance for, as all familiar with bar admission proceedings know, exclusion of unworthy candidates frequently depends upon the thoroughness of the Committee's questioning revealing as it may infirmities in

an otherwise satisfactory showing on his part. This is especially so where a bar committee, as is not infrequently the case, has no means of conducting an independent investigation of its own into an applicant's qualifications. (*Konigsberg* v. *State Bar of California, supra,* at 42.)

The questions involved in this case were designed to disclose information which would enable the committee to know more about the applicant and to test the evidence produced by him as to his character.

The questions were designed solely to produce information from which the committee could determine the applicant's fitness to be admitted to the practice of law. The questions were not designed to test applicant's political beliefs. There is no showing in the record of this case that association in any group would result in applicant's exclusion from the bar. There is, therefore, no problem about the claimed "chilling effect" upon freedom of association. The answers might disclose the names of associates who have known petitioner intimately for some period of time. The committee could then turn to these persons to resolve any questions in their minds as to the applicant's qualifications. If these persons were to disclose information detrimental to petitioner it is unlikely that petitioner would volunteer their names. The information revealed by these questions may show that petitioner has engaged in conduct which justifies his exclusion from the bar. It is also unlikely that petitioner would volunteer this information.

The cases of *Schneider* v. *Smith,* 390, U.S. 17 (1967) and *Shelton* v. *Tucker,* 364 U.S. 479 (1960) cited by petitioner are readily distinguishable from the case at bar. The *Schneider* case involved the Magnuson Act which gave the President authority to issue rules and regulations to safe-

guard vessels in waters subject to the jurisdiction of the United States. This Court held that this Act did not authorize a screening program for personnel on merchant vessels. In this case, it is clear that the State of Ohio has the authority to screen applicants for admission to the bar to insure that they are properly qualified.

The *Shelton* case considered a statute which required every teacher in a state-supported school or college to file annually an affidavit listing every organization to which he had belonged or regularly contributed within the preceding five-year period. The teachers subject to the statute were hired on a year-to-year basis. They were not covered by civil service and had no job security. Under these circumstances a teacher would naturally tend to avoid any group or organization which might displease his superiors. The fact that there was nothing to prevent the information from being made public would increase this tendency. Public exposure could bring public pressure upon school authorities to discharge a teacher. Since these affidavits were required annually, there would be continual pressure on teachers to avoid joining or supporting any controversial groups. This Court, therefore, properly found that because of its interference with associational freedom the statute was invalid.

In this case, none of these factors is present. There is no requirement that an affidavit be filed annually. Neither is there a problem concerning lack of job security. The so-called "chilling effect" on freedom of association is therefore absent here. Applicants are free to join any group they desire. There is nothing in this record to show that mere association in any group would prevent an applicant's admission. The questions involved in this case are designed to reveal background information relevant to a person's qualifications for admission to the practice

of law. There is no other practical way for the committee to obtain such information.

It is not contended that petitioner should be required to disclose any information which might tend to incriminate him. Petitioner has the right to refuse to answer any question on that basis. Petitioner's right to remain silent, however, does not excuse him from satisfying the required standards to be admitted to the practice of law in Ohio. If an applicant can thwart the investigation by his refusal to answer relevant questions, the Supreme Court of Ohio cannot properly determine his qualifications.

> * * * The Court has repeatedly recognized that it is permissible to deny a status or authority to a claimant of the privilege against self-incrimination if his claim has prevented full assessment of his qualifications for the status or authority. Under this rule, the applicant may not both decline to disclose information necessary to demonstrate his fitness, and yet demand that he receive the benefits of the status. He may not by his interjection of the privilege either diminish his obligation to establish his qualifications, or escape the consequences exacted by the State for a failure to satisfy that obligation. *Spevack* v. *Klein*, 385 U.S. 511 at 526 (dissenting opinion by Harlan, J.)

To the same effect see also: *Konigsberg* v. *State Bar of California*, 366 U.S. (1961); *In Re Anastaplo*, 366 U.S. 82 (1961); *Orloff* v. *Welloughby*, 345 U.S. 83 (1963).

The case of *Spevack* v. *Klein*, 385 U.S. 511 (1967), is substantially different from the instant case. That case involved an attorney admitted to the practice of law who refused, on the basis of his privilege against self-incrimination, to answer questions in a disbarment proceeding. There was no independent evidence of misconduct. The state attempted to use his failure to testify as conclusive proof that he was unfit to practice law. This Court held that he could not be disbarred merely for exercising his

constitutional privilege. To hold otherwise would offer the state a dangerous short cut. The burden of proving misconduct in disciplinary proceedings rests with the state. In the instant case petitioner was not being punished for exercising his privilege. However, his failure to provide necessary information prevented the committee from determining whether or not he was properly qualified. Until it could make this determination, the committee could not properly recommend his admission.

The obstruction to the investigation of the committee in the instant case is more significant than that in the *Konigsbery* or *Anastaplo* cases, *supra*. There, the applicants refused to answer questions concerning membership in the Communist Party. Here, petitioner has also refused to name any clubs, societies or organizations of which he is or had been a member. Because of petitioner's refusal to answer these questions the committee was "unable to complete the necessary investigation into his moral and character fitness". (Appendix, p. 27a). As this Court recognized in *Konigsberg* v. *State Bar of California*, 366 U.S. 36 at 46-47, (1961), the requested information may provide a valuable insight into the applicant's character and open new areas of investigation. The crucial point is that because petitioner refused to answer either of the questions, the admissions committee could not make a final determination concerning his character and fitness for admission to the practice of law.

The State of Ohio clearly has a substantial interest in insuring that those persons admitted to practice law in that state possess these required qualifications. The state has no practical means with which to conduct an independent investigation as to each applicant. In order to protect its interest, it must, therefore, have the right to require each applicant to furnish evidence relative to his qualifi-

cations. The State must also have authority to require information concerning matters which may not be volunteered by the applicants and to test the evidence produced by applicant. That is the only issue that is involved in this case.

The State of Ohio is not interested in the political beliefs of its applicants. Neither is it attempting to require any applicant to incriminate himself. It is merely attempting to insure that those persons admitted to the practice of law in Ohio possess the proper qualifications. Applicant contends that had he answered these questions the State of Ohio might have used the information in violation of the Constitution of the United States. There is nothing in the record to support this contention. Applicant is asking this Court to assume, without any basis in the record, that the committee and the Supreme Court of Ohio would act contrary to law. Such an assumption is clearly improper.

The questions involved herein are valid and there is no basis in the record of this case to assume that the information would be used in an unlawful manner. There is, therefore, no reason not to uphold the use of such questions. An applicant has ample protection against the unconstitutional application of the information which he discloses. Any applicant who is unlawfully denied admission to the practice of law has an adequate remedy. Such denial would be subject to review and reversal by this Court. See e. g. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, (1957); *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957). The questions involved herein provide relevant information necessary to determine an applicant's qualifications to practice law. This Court has jurisdiction to provide a remedy if and when the information disclosed by such questions is used in an unlawful manner. Respondents respectfully contend that this Court should, therefore, uphold the use of such questions.

CONCLUSION

The State of Ohio and the people thereof have a substantial interest in insuring that persons admitted to the practice of law in that state possess the required qualifications, including moral qualifications. The State also has authority to investigate and interrogate each applicant in order to determine whether he possesses such qualifications. In the event an applicant fails to answer relevant questions designed to enable the committee to make this determination, he has not only failed to show that he possesses these qualifications but has also prevented the committee from making a adequate determination. He should, therefore, be excluded from the practice unless and until he furnishes such information.

Respectfully submitted,

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APPENDIX A

Art. IV, Sec. 2(B) (1)

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any case on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

APPENDIX B

Art. IV, Sec. 5(B)

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.